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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 121

SAM WALDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 185–190) are reported at 201 F. 2d 715.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1953 (R. 190). On March 16, 1953, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark (R. 191) to April 20, 1953, on which date the petition was filed. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

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QUESTIONS PRESENTED

1. Whether the exclusionary rule, which forbids the use of evidence obtained in violation of the Fourth Amendment, is absolute, so as to preclude, in a trial involving another narcotics offense, the use in rebuttal of knowledge gained in the procurement of such evidence for the limited purpose of impeaching petitioner's direct testimony that he never possessed or dealt in narcotics.

2. Whether such evidence was proper impeaching evidence.

3. Whether, if there was error in the admission of such evidence, it was harmless, under the circumstances of the case, in view of the Government's overwhelming evidence in its case in chief, and the mere cumulative nature of the questioned rebuttal testimony.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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Rule 41 (e), F. R. Crim. P., provides:

> **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

On January 18, 1952, a four-count indictment was filed against petitioner in the Western Dis-

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trict of Missouri, charging him with violating 26 U. S. C. 2554 (a), in that, on four separate occasions during the first half of 1951, he did sell, in Kansas City, Missouri, varying quantities of heroin, a derivative of opium (R. 5–6).

On January 30, 1952, following a trial by jury, petitioner was found guilty on all four counts (R. 13, 14, 183) and sentenced to 5 years' imprisonment on each, the first three terms to run consecutively and the last one to run concurrently with the others (R. 13–14, 185).

The evidence adduced at the trial may be summarized as follows:

The Government's evidence.—Count I: During the evening of January 9, 1951, narcotics agents Follmer, Hall and Witt met by prearrangement, on a street in Kansas City, Missouri, one Jenkins, a drug addict (R. 45, 56, 57–58, 87, 91, 117–118). They instructed Jenkins to attempt to purchase some heroin from petitioner (R. 45, 88, 118). After an unsuccessful attempt to locate petitioner that evening, Jenkins learned, after midnight, that petitioner had left a certain tavern to return to his apartment (R. 45, 88, 118). The agents then drove Jenkins to the vicinity of petitioner's apartment, where Witt's search of Jenkins assured the agents that he had no narcotics or money in his possession (R. 45, 88–89, 118). Jenkins was furnished $10.00 from "official advance funds" with which to purchase heroin from petitioner (R. 45, 89, 118–119). About 1 a. m.,

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January 10, 1951, the agents saw Jenkins enter the apartment building, where petitioner maintained his residence on the second floor (R. 46, 89, 90, 119). They kept the building under surveillance, from a point across the street, during the time that Jenkins remained therein (R. 47, 119). Shortly after Jenkins entered the building, the agents saw petitioner come out of the building with a large dog, stand on the corner for a few minutes, and reenter the building (R. 46, 119).

Jenkins testified that, after receiving $10.00 from the agents, he went to petitioner's apartment, where petitioner told him that "he had to go to a stash" to get the heroin (R. 89–90). Petitioner then left the apartment with his dog (R. 90). Jenkins remained therein alone for a while until petitioner returned with two packages (R. 90). Petitioner, after mixing the heroin from one package with milk sugar from the other package, gave the mixture to Jenkins in exchange for the $10.00 (R. 90–91). Jenkins then left the apartment and returned to the agents' automobile, where he surrendered to agent Witt a package, which contained five grains of heroin (R. 46–47, 48, 91, 119–120).[1] Then Witt, after again searching Jenkins, ascertained that the latter no longer

[1] The testimony of the chemist who made the analysis of the narcotics has not been incorporated in the printed record. It appears on pages 241–245 of the typewritten transcript of the testimony and proceedings in the trial court, a copy of which has been lodged in this Court.

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had the $10.00 and that he did not have any other narcotics on his person (R. 47, 91, 119).

Count II: Sometime prior to April 10, 1951, petitioner had asked one Taylor, a drug addict, to become a narcotics dealer for him (R. 99–100, 108). On April 10, 1951, petitioner gave Taylor his telephone number, which was not listed in the directory, and advised Taylor to call him for arrangements to receive narcotics (R. 100–101, 120, 154–155).

About 2 p. m. on April 11, Taylor met agents Follmer, Hall and Witt at a pre-determined street location in Kansas City, Missouri (R. 48, 100, 120). Witt accompanied Taylor to a drug store, where the latter called the unlisted telephone number and made arrangements with petitioner to receive narcotics from him at the Green Duck Tavern (R. 48, 101, 121, 134–135).[2] The agents then drove Taylor to the vicinity of the tavern, where Witt's search of Taylor revealed that he had no narcotics or money in his possession (R. 48, 101, 121). Taylor, after receiving from Witt $20.00 for the purpose of buying narcotics from petitioner, entered the Green Duck Tavern, while the agents secreted themselves in a laundry shop across the street (R. 48, 101–102, 121). Shortly thereafter, petitioner called Taylor over the tavern telephone, informing him that

[2] Agent Witt either dialed or observed the dialing of the unlisted number, and overheard Taylor's end of the conversation (R. 121, 134–135).

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petitioner would be late (R. 102). Taylor then, by a telephone call to Follmer in the laundry shop, relayed the information to the agents (R. 48, 102, 121). A few minutes later petitioner again telephoned Taylor in the tavern, asking Taylor to meet him at the Santa Fe Tavern, a little more than a block away (R. 102). Taylor returned to the agents' automobile, where another search by agent Witt disclosed that Taylor had no narcotics on his person and that he still had the $20.00 in his possession (R. 48, 102, 121–122).

The agents then drove Taylor to the Santa Fe Tavern, which he entered, as the agents watched from a short distance away (R. 48–49, 102, 122). After waiting about 20 minutes for petitioner, Taylor left the tavern (R. 49, 102, 122). As he reached the street, observed by the agents, he saw petitioner looking in his direction from "across the street as though he was getting ready to cross" (R. 102, 49, 122). Thereupon, Taylor reentered the tavern, followed closely by petitioner (R. 49, 102–103, 122). Taylor joined petitioner at the bar, and, while drinking beer, Taylor handed petitioner $20.00 in exchange for a package, which contained ten capsules of heroin (R. 103, 49, 122). Taylor then returned to the car, observed by the agents, and surrendered the package to Witt, who, upon searching Taylor again, failed to discover any money or narcotics on him (R. 49, 103, 122–123).

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Count III: The following evening, April 12, 1951, the same three narcotics agents, together with agent Shattuck, again met Taylor at the same street location (R. 49–50, 103–104, 123). Agent Witt and Taylor proceeded to a drug store, from which the latter called petitioner's unlisted telephone number and arranged to purchase more drugs from petitioner at the Green Duck Tavern (R. 50, 104, 123). The agents then drove Taylor to the vicinity of the tavern, where he was searched with negative results and given $20.00 (R. 50, 104, 123–124). At the tavern, Taylor received a telephone call from petitioner, who asked him to go to Wilson's Bar, "over a mile" away (R. 104–105). Taylor was then driven to the vicinity of Wilson's Bar, where Witt, after searching Taylor again, ascertained that he still had the $20.00 in his possession (R. 50, 105, 124). The agents then observed Taylor as he entered the barroom (R. 50, 124–125). In the "men's restroom" of the bar, Taylor paid $20.00 to petitioner, who pulled out a package, containing 10 capsules of heroin, from under the face bowl and handed it to Taylor (R. 105, 125). At the same time petitioner told Taylor that in the future he would have to buy in amounts of at least $50.00 (R. 105–106). Taylor then left the bar, observed by the agents, and returned to the agents' automobile, where Witt, after receiving the package from him, found no other narcotics and no money on his person (R. 50–51, 106, 125).

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Count IV: In the afternoon of May 8, 1951, agents Follmer, Witt and Shattuck again met Taylor at the same rendezvous, for the purpose of making another purchase of drugs from petitioner (R. 51, 106–107, 126). Agent Witt again accompanied Taylor to a drug store, where the latter, after calling petitioner at his unlisted telephone number, was instructed by petitioner to come to his apartment for narcotics (R. 51, 107, 126). The agents then drove Taylor to the vicinity of petitioner's apartment, where Witt, after ascertaining through a search of his person that Taylor had no narcotics, gave him $50.00 (*ibid.*). The agents observed Taylor enter the building, wherein petitioner maintained an apartment (R. 51, 126–127, 107). In his apartment, petitioner handed Taylor a package for which the latter gave him $50.00 (R. 108). Since the package contained only 8 capsules of heroin, Taylor requested and received a refund of $34.00 (the wholesale price being $2.00 per capsule) (*ibid.*). Taylor then returned to the agents' car, where he gave Witt the package containing 8 capsules of heroin, and $34.00 (R. 52, 127–128). Witt's search of Taylor revealed no other narcotics or funds on his person (R. 52, 127).[3]

[3] The testimony of agent Hall, who testified with respect to the January 10, April 11, and April 12 transactions, and agent Shattuck, who testified concerning the April 12 and May 8 transactions, was to the same effect as the testimony of agents Follmer and Witt with respect to those transactions. Their testimony has not been incorporated in the

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Evidence for the defense:—Petitioner, the only witness for the defense, testified in his own behalf (R. 137–169). He denied that he made the various sales of heroin (R. 137). And, among other things, he also testified on direct examination, as follows (R. 137–138):

> Q. Now, first, Mr. Walder, before we go further in your testimony, I want you to tell the Court and jury whether, not referring to these informers in this case, but whether you have ever sold any narcotics to anyone.
>
> A. I have never sold any narcotics to anyone in my life.
>
> Q. Have you ever had any narcotics in your possession, other than what may have been given to you by a physician for an ailment?
>
> A. No.
>
> Q. Now, I will ask you one more thing. Have you ever handed or given any narcotics to anyone as a gift or in any other manner without the receipt of any money or any other compensation?
>
> A. I have not.
>
> Q. Have you ever even acted as, say, have you acted as a conduit for the purpose of handing what you knew to be a narcotic from one person to another?
>
> A. No, sir.

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printed record. It appears on pages 247–273 of the typewritten transcript of the testimony and proceedings in the trial court.

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With respect to the foregoing testimony he was cross-examined as follows (R. 161–163).

Q. Now, I believe that you testified on direct testimony that you have never had anything to do with narcotics, is that correct?

A. Yes, sir.

Q. Ever possessed any?

A. No, sir.

Q. Or had any in your possession?

A. Not in my possession, no, sir.

Q. Ever sell any?

A. No, sir.

Q. Ever buy any?

A. No, sir.

Q. Where were you living in February, 1950?

A. I think I was living at 2620 Prospect.

Q. What apartment?

A. Apartment 3.

Q. Where was that?

A. It is on the second floor.

Q. Do you know Mr. Witt and Mr. Follmer?

A. I have saw them before.

Q. Do you recall going to your apartment with them on the evening of February 19th or early in the morning of February 20, 1950?

Mr. ROPE. Now, if it please the Court, again I wish to object to this statement on the part of the witness. In the first place, any previous relationship which he wishes to inquire about with these officers is not

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within the issues of this case whatsoever. I think that is certainly true. He is referring to a date back in 1950.

The COURT. The witness has testified today on cross examination. He testified on direct examination yesterday that he had never had anything to do with narcotics other than a doctor's prescription. I assume from what the Court must know, what counsel for the Government has in mind, and I think for that purpose it is a perfectly legitimate question.

Mr. ROPE. Well, I will withdraw the objection until I hear the rest of the question.

The COURT. That is all right, if you want to argue the question we will excuse the jury and let you make the argument about it. I don't want to prejudice your client's case about it, but I say the Court must know, and in connection with the matter I assume what counsel has in mind. So counsel ask the question and then if you want to argue it, your legal phase of it, the Court will hear you out of the presence of the jury.

Mr. ROPE. Yes.

By Mr. AULL:

A. I think the question—I will rephrase the question. I will ask you whether or not the evening of February 19th or early in the morning of February 20th, in the company of Agents Follmer and Witt of the Narcotics Bureau here in Kansas City, Missouri, you went to your apart-

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ment at 2620 Prospect here in Kansas City, Missouri?

A. Did I go there with them?

Q. Yes.

A. Yes.

* * * * *

Q. Now, when you arrived at that apartment, I will ask you, Mr. Walder, whether or not you turned over to them 1 grain of heroin?

A. I did not.

Q. You did not, you deny that categorically?

A. Yes, sir.

Q. Now, I will ask you if on that occasion prior to arriving you stated to these officers that should they find any narcotic drugs in this apartment, that they were your property and your wife, Freda, was in no way responsible for any drugs which might be found?

A. I don't recall any such conversation.

Q. Do you deny that?

A. I deny.

Q. You recall going out there with the officers?

A. Yes, sir.

Q. Do you recall any narcotics being obtained at that time?

A. I do not.

Q. Do you deny it?

A. I deny it.

At this point, petitioner's counsel objected to this line of questioning (R. 163). In the ensuing dis-

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cussion, out of the presence of the jury, the trial judge took judicial notice of his own order, issued in May 1950, whereby he had suppressed, on the grounds of illegal search and seizure, the use in evidence of the same narcotics to which the cross-examination related (R. 163–164).[4] However, the judge held in the instant case that, since petitioner opened up the subject by testifying that he had never had anything to do with narcotics, he could be cross-examined concerning the suppressed narcotics for the sole purpose of impeaching him as a witness (R. 164–165, 166). Upon its resumption, the cross-examination continued as follows (R. 165–168):

> Q. I will ask you, Mr. Walder, whether or not when you went to your apartment at 2620 Prospect in Kansas City, Missouri, either on the late evening of February 19th or early on the morning of February 20th, in company with Narcotic Agents Witt and Follmer and two deputy sheriffs, whether or not at that time, whether or not you told them that should they find any narcotic drugs on the premises that they were your property and that your wife, Freda, was in no way responsible for any drugs which might be found?
>
> Mr. ROPE. Now, if it please the Court, I believe that the defendant would like to make objection at this time to that question

[4] This order is printed in the Appendix to petitioner's brief, pp. 25–27.

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as being prejudicial, inflammatory and an attempt to prove prior arrest by innuendo, and it is a matter constituting no evidence whatsoever in this case. It is entirely immaterial, incompetent and irrelevant and places such a prejudice in the minds of this jury against this defendant that no charge on the part of the Court can possibly cure it, and the defendant asks at this time that the jury be discharged.

The COURT. The objection will be overruled in both instances and the Court will say that the testimony, the question is being permitted, and if there should be further testimony concerning it, it will be admitted solely by way of impeachment of the witness' statement that he had never had anything to do or any connection with narcotics. It is not for the purpose of determining the exact guilt or the innocence of any of these acts in this information, but in view of the witness' testimony, the defendant's testimony that he had never had anything to do with narcotics except, as the Court recalls the language, "as prescribed by a physician." This testimony is being admitted in that connection. In view of his denial of that, the objection will be overruled. Proceed.

The WITNESS. What was the question again?

By Mr. AULL:

Q. Whether or not on the late evening of February 19th or early February 20, 1950,

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that you, in company with Agent Follmer and Agent Witt of the Narcotics Bureau, together with deputy sheriffs of Jackson County, went to your apartment at 2620 Prospect and on the way to that apartment that you made the statement to them that should they find any narcotic drugs there, that the same were your property and that your wife, Freda, was in no way responsible for any drugs which might be found?

A. I made no such.

Q. You made no such statement. Now, I will ask you, Mr. Walder, whether you recall visiting the office of the Bureau of Narcotics on February 24, 1950?

A. I do not.

* * * * *

Q. Referring to the question that on the 24th of February, 1950, you made, in substance, the following statement to Agents Follmer, Witt, and Shattuck at the office of the Bureau of Narcotics in this building here in Kansas City, that you had previously purchased heroin from several persons in Chicago in rather large amounts, and explained that you meant by that from one to two ounces at a time, and that you were well acquainted with the big narcotic peddlers of Chicago, and that you were solid with these contacts; further, that if you were to assist the Government in the purchase of heroin by you, you would have to have not less than one ounce as you were known as a wholesaler dealer and it would

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not be logical for you to attempt to purchase heroin in quantities of less than one ounce. Did you make that statement?

A. May I answer that question in full?

Q. You certainly may.

A. I was approached by Mr. Follmer and asked if I would be a stool pigeon and I told him——

Q. (Interrupting.) I am asking you——

The COURT. (Interrupting). Did you make this statement?

A. No, I did not make that statement. He approached me and asked me that.

The COURT. Now, make such explanation as you want to make in this connection with it.

The WITNESS. Did you say you——

The COURT. I said if you can, if there is any explanation you want to make——

A. I was approached by Mr. Follmer, who asked me if I would assist him in making some buys and I told him I couldn't do it because I didn't know any. He said if I would, he would give me a break and I wouldn't have to be doing any time for the charge they were charging me with.

By Mr. AULL:

Q. I am going to ask you, Mr. Walder, whether or not you voluntarily came to the office of the Bureau of Narcotics on February 24, 1950, without any solicitation and make the statement that I have just stated?

A. I did not.

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On redirect examination petitioner again denied making any statements to narcotics agents (R. 168).

The Government's rebuttal.—Agent Witt testified, without objection, that early in the morning of February 20, 1950, petitioner, while on the way to his residence in the company of agents Witt and Follmer and two deputy sheriffs, told them that whatever narcotics they might find belonged to him, and not his wife (R. 173). On arrival in the apartment, petitioner handed agent Follmer a capsule containing 1.1 grains of heroin (R. 174, 175).

Agents Witt and Shattuck also testified that on February 24, 1950, petitioner came to their office, where he told them "that he was well acquainted with the big narcotic peddlers of Chicago" from whom "he had previously purchased heroin" in quantities of "one to two ounces at a time", and "that if he were to assist the Government, any purchases of heroin by him would have to be in quantities of not less than one ounce for he was known as a wholesale dealer, and it would not be logical for him to attempt to purchase heroin in quantities less than one ounce" (R. 174, 170).

In his charge to the jury, the judge again instructed them that the testimony "concerning certain alleged admissions and certain other evidence with respect to the former possession of narcotics" was allowed, not as "proof of the guilt

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of the defendant in this particular case, but that it was admitted simply by way of impeachment if it was, if you believe it" (R. 181).

On appeal, the judgment of conviction was affirmed by a divided court. The majority held that the testimony concerning the 1950 seizure of narcotics was properly allowed for the limited purpose of impeachment (R. 188, 190). Judge Woodrough, in his dissent, stated simply that he thought "the fruits of the illegal search of the appellant's home were erroneously received in evidence against him" (R. 190).

SUMMARY OF ARGUMENT

I

The principle question in this case relates to the admissibility in rebuttal of testimony concerning heroin found in petitioner's apartment, the use of which as evidence had previously been suppressed. The District Court allowed testimony as to this matter to be elicited solely as bearing on the issue of petitioner's credibility, because petitioner on his direct examination had voluntarily testified that he had never possessed, handled or dealt with narcotics, testimony which the District Court knew from the prior proceeding to be utterly false.

The Government's basic position is that the exclusionary rule does not extend so far as to enable a defendant to use it as a cover for the commission of perjury. To do so would transform the

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exclusionary rule, which is designed to provide a deterrent to illegal action by law enforcement officers, into an instrument for the perversion of truth. The exclusionary rule protected petitioner, as a defendant, from conviction for the 1950 possession of narcotics; it should not also grant him, as a witness, immunity to testify falsely while on trial for his sales of other narcotics in 1951.

Even with respect to the privilege against self-incrimination, the rule of most state courts where the question has arisen is that any testimony by a witness as to a particular transaction waives the privilege completely as to all other inquiries pertinent to that transaction on the theory that injustice would result if a witness were permitted to stop after telling only part of his story. The same rationale applies here. After petitioner deliberately opened up the subject of his prior possession of narcotics, the court should not be precluded from considering the suppressed evidence for the limited purpose of nullifying the effect of petitioner's deliberate lie. This Court in *Agnello* v. *United States,* 269 U. S. 20, although holding the principle inapplicable to the facts of that case, implicitly recognized that, where direct testimony opens the door to a particular transaction, admission of suppressed evidence with respect thereto might be justified. The Government is not here contending for any departure from the general rule of exclusion. We contend merely

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that suppressed evidence may be used to the extent necessary to neutralize affirmative perjury.

II

Petitioner's argument, that, even if the evidence was admissible under the Fourth Amendment, it was not competent impeaching evidence, is untenable. The Government did not initiate the inquiry into petitioner's past experience with narcotics. Petitioner himself opened up the subject and made his past conduct, evidencing respect for the narcotic laws, a material matter in support of his denial of guilt of the offenses charged. Rebuttal evidence contradicting his credibility as to an issue which he himself injected in the case was, therefore, clearly proper. *Scott* v. *United States,* 172 U. S. 343, 347-348; *Brady* v. *United States,* 148 F. 2d 394 (C. A. 9); *Dowling Brothers Distilling Co.* v. *United States,* 153 F. 2d 353 (C. A. 6), certiorari denied *sub nom. Gould* v. *United States,* 328 U. S. 848.

III

If there was error in the admission of testimony as to the finding of narcotics in 1950, the evidence was, in the circumstances of this case, harmless. The Government's evidence in its case in chief, summarized in the Statement, was overwhelming. The questioned testimony related to an entirely separate transaction which had occurred about a year before the acts for which

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petitioner was being tried, and the limited effect to be given to it was carefully explained to the jury. Moreover, even as to the purpose for which the testimony was admitted, there was other, clearly admissible evidence, that petitioner had told the agents shortly after the 1950 seizure that he was a dealer in narcotics. In view of the cumulative nature of the questioned testimony, its strict limitation by the trial judge, and the overwhelming evidence of guilt, the admission of the particular item of evidence here involved cannot be deemed prejudicial.

ARGUMENT

I

THE WEEKS RULE SHOULD NOT BE APPLIED SO AS TO PRECLUDE THE USE OF THE SUPPRESSED EVIDENCE FOR THE LIMITED PURPOSE OF NEUTRALIZING PETITIONER'S PERJURY ON HIS DIRECT EXAMINATION

The principal question in this case is the admissibility of the rebuttal testimony concerning the finding by the narcotics agents, in 1950, of 1.1 grains of heroin in petitioner's apartment. Petitioner's contention is that such testimony was incompetent for any purpose, because it was based on knowledge obtained by the agents as the result of the unlawful seizure of the heroin, the use of which as evidence had been previously suppressed.

The rebuttal testimony was competent, since it was not admitted as part of the substantive evi-

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dence in support of petitioner's guilt of the offenses charged, but solely for the limited purpose of impeaching petitioner's credibility so as to neutralize the effect of his own voluntary perjury on his direct examination. To hold otherwise would be to extend the scope of the rule which forbids the use in evidence of fruits of an illegal search and seizure beyond the practical considerations of the public policy underlying the rule.

The Fourth Amendment to the Constitution, the search and seizure provisions of which the rule is designed to implement, does not specifically prohibit the use in evidence of the fruits of an illegal search and seizure. *Wolf* v. *Colorado,* 338 U. S. 25. At common law, the courts did not stop, in the course of a trial, to inquire as to the collateral matter of the source of otherwise competent evidence. See *Adams* v. *New York,* 192 U. S. 585; *People* v. *Defore,* 242 N. Y. 13, 150 N. E. 585 (1926). But, as the result of the doctrine of exclusion adopted in *Weeks* v. *United States,* 232 U. S. 383, procedures have been evolved for the suppression of illegally obtained evidence. See Rule 41 (e), F. R. Crim. P.; *Agnello* v. *United States,* 269 U. S. 20; *Gouled* v. *United States,* 255 U. S. 298; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385.

The application of the *Weeks* rule is, however, to be considered in terms of its policy. Its

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primary function is to reinforce the constitutional guaranty of the Fourth Amendment. It deters unlawful acts of search and seizure by federal enforcement officers by rendering the fruits of their unlawful actions valueless as a means of conviction. Thus, "it is an extraordinary sanction" (*United States* v. *Wallace Co.*, 336 U. S. 793, 796), for it inevitably furnishes to a criminal immunity from punishment. As such, it conflicts with the compelling social interest in curbing crime. "On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office." *People* v. *Defore*, 242 N. Y. 13, 24–25, 150 N. E. 585, 589 (1926). The rule, therefore, is the result of the careful balancing of the conflicting social interests involved. *Nueslein* v. *District of Columbia*, 115 F. 2d 690, 696 (C. A. D. C.). For this reason the rule cannot be absolute. The remedy provided thereby is not an essential ingredient of the right of privacy. *Wolf* v. *Colorado*, *supra*, at 29. It can be valid only as long as it serves the predominating interest. Once there is a shift in the interest to be protected, the rule should be limited in favor of the more momentous interest.

Undoubtedly, every rule of privilege inevitably condones to some degree a suppression of truth, and prevents the trier of facts, whether judge or jury, from hearing pertinent testimony. Thus, the constitutional privilege against self-incrimina-

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tion, the *McNabb* rule of evidence against the admission of even uncoerced confessions, as well as the one here under consideration, all authorize the suppression of truth. They are all based upon the proposition that the courts will not, even in the interest of truth, sanction the use of evidence obtained in violation of a basic right. It is one thing, however, to prohibit the Government's affirmative use of illegally seized evidence, and it is another thing to permit the same rule to be used by a defendant as a license to impose a falsehood upon the court. The former practice serves a public interest, but whatever benefit may be thought to derive from permitting the latter is outweighed by the evil which it encourages. This is so since permitting the use of the information for rebuttal purposes, as in the instant case, will not tend to promote violations of the Fourth Amendment. Evidence is seized in the main, not in contemplation of its possible use for impeachment purposes, but rather for use as affirmative proof of crime. Thus, to extend the rule to cover the situation in this case will not help to fulfill its purpose as a safeguard of the constitutional right of privacy to such an extent as to justify the ensuing injury to the integrity of the courts. There is clear danger in extending a rule to a point where it imports a policy which transcends the reasons for the rule.

Petitioner's argument would have the effect of requiring the trial judge to permit to go to the jury unimpeached petitioner's testimony that he

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never possessed or dealt with narcotics, testimony which the trial judge actually and judicially knew to be an unmitigated lie.[5] A rule which was designed to deter law enforcement officers from violating rights under the Fourth Amendment should not be permitted to be used as a cover for perjury. As stated in *Carroll* v. *United States,* 267 U. S. 132, 149, and approved in *Olmstead* v. *United States,* 277 U. S. 438, 465, "The Fourth Amendment is to be construed * * * in a manner which will conserve public interests as well as the interests and rights of individual citizens." Although the rule gives an advantage or privilege to a defendant, such advantage or privilege must be subject to such conditions as will prevent it from redounding to an unfair and unreasonable advantage or privilege. The rule protected petitioner, as a defendant, from conviction for the 1950 possession of narcotics, but it should not also grant him, as a witness, a privilege to testify falsely on his trial for the 1951 sales of other narcotics.

Even a direct constitutional right, the privilege against self-incrimination, is not absolute. It is well established that "where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details." *Rogers* v. *United States,* 340 U. S.

[5] In the 1950 suppression proceeding, petitioner categorically asserted ownership of the suppressed narcotics (Appendix to Pet. Br., p. 22).

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367, 373, and cases cited. And while, as this Court pointed out in that decision (fn. 15, p. 373), the federal courts have not been called upon to deal with "the problems arising out of a possible abuse of the privilege against self-incrimination in adversary proceedings", the rule of most of the state courts is that any testimony by a witness as to a particular transaction waives the privilege completely as to all other inquiries pertinent to that transaction on the theory that injustice would result if a witness were permitted to stop after telling part of the story, for the evidence voluntarily given might be completely misleading. See decisions collected in 147 A. L. R. 255, 8 Wigmore, *Evidence* (3rd ed. 1940), Section 2276. It was on a similar rationale that the courts below held the suppressed evidence here in question admissible for impeachment purposes. We submit that just as the necessity of getting the complete story before a jury justifies a reasonable interpretation of the constitutional privilege against self-incrimination, so the same necessity justifies the limitation upon the *Weeks* rule which the courts below allowed in this case.

Petitioner, upon electing to become a witness in his own behalf, assumed the dual role of the accused-witness. In the capacity of a witness he became subject to all rules of evidence applicable to witnesses generally. He became subject to all the incidental tests of testimony ordinarily ap-

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plied to witnesses. He became subject to impeachment the same as any other witness. Thus, when petitioner voluntarily testified on direct examination that he never possessed or dealt with narcotics, it was not only proper, but incumbent on the court, in the interest of having the truth before the jury, to permit the testimony relating to petitioner's 1950 possession of narcotics. Adherence to the rule of suppression in the circumstances of this case would in effect amount to knowing acquiescence in perjury by petitioner as a witness. Thus far, we submit, the *Weeks* rule does not extend.

In support of his contention that the exclusionary rule precluded the use of the impeachment testimony in the instant case, petitioner relies principally (Pet. Br., pp. 7–8) upon this Court's decision in *Agnello* v. *United States,* 269 U. S. 20, of which the court below made no mention. In that case the Government, in its case in chief, showed that narcotics agents, who knew that two informants had previously arranged with defendant Alba to purchase narcotics, while watching through a window of Alba's house, saw Agnello hand a number of small packages to one of the informants, who passed some money to Alba. The agents then rushed into the house, arrested the defendants, and found packages of cocaine on the table and in Agnello's pockets. 269 U. S. at 28–29. The Government also offered testimony, as part of its case in chief, that immediately after

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the arrest other agents searched Agnello's house, where in his bedroom they found a can of cocaine which was offered in evidence. That evidence, however, was excluded on the ground that the search and seizure without a warrant away from the place of arrest were illegal.

In defense, Agnello testified on direct examination that, although he had received the packages from one Centorino, a codefendant, he did not know their contents.* Thereafter, "On cross examination, he said that he had never seen narcotics. Then, notwithstanding objection by defendants, the prosecuting attorney produced the can of cocaine which the Government claimed was seized in Agnello's bedroom and asked him whether he had ever seen it. He said he had not, and specifically stated he had never seen it in his house. In rebuttal, over objections of defendants, the Government was permitted to put

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*The record in the *Agnello* case (Oct. Term, 1925, No. 6) shows that in this connection, Agnello also testified as follows:

"Q. Did you know Centorino before that time?

"A. I did.

"Q. Had you ever spoken to him at any time in your life about cocaine? About selling cocaine?

"A. No, sir.

"Q. Did you ever have any conversation with Alba about selling cocaine?

"A. No, sir. (p. 471.)

* * * * *

"Q. Up to that time had you heard any discussion about the sale of narcotics?

"A. No, sir. (p. 473.)"

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in the evidence of the search and seizure of the can of cocaine in Frank Agnello's room, which theretofore had been offered and excluded." (269 U. S. at pp. 29–30.)

In respect of this evidence, this Court held (269 U. S. at 35):

> * * * And the contention that the evidence of the search and seizure was admissible in rebuttal is without merit. In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. *In cross-examination,* in answer to a question permitted over his objection, he said he had never seen it. *He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search.* As said in *Silverthorne Lumber Co.* v. *United States, supra,* 392, "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." The admission of evidence obtained by the search and seizure was error and prejudicial to the substantial rights of Frank Agnello. The judgment against him must be set aside and a new trial awarded. [Italics added.]

Petitioner attempts to bring the instant case within this ruling in the *Agnello* case by arguing that Agnello's testimony on his direct examination

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that he had had no conversations concerning narcotics (see fn. 6, p. 29, *supra*) was the equivalent of petitioner's denial on his direct examination that he had never possessed, sold, or otherwise dealt in narcotics in so far as it opened the door to the rebuttal evidence in question. It is to be noted, however, that the existence of the suppressed evidence in Agnello's case was not in direct contradiction of his direct testimony that he had had no conversations about narcotics. Thus, the suppressed evidence did not directly and conclusively give the lie to Agnello's testimony on direct examination, as is the case here. It was not until Agnello denied on *cross-examination* that he had ever seen narcotics (No. 6, O. T. 1925, R. 476) that a point of direct contradiction of the suppressed evidence was reached. Significantly, this Court pointed out in the portion of the opinion quoted above, that "In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine." At the same time, by commenting on the fact that Agnello "did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search," the Court left the inference that in a case where there is voluntary testimony in direct contradiction of suppressed evidence, such evidence would be admissible in rebuttal. It implicitly recognized thereby that, had Agnello on *direct examination* given testimony which could have been

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construed as opening the door to examination concerning the suppressed narcotics, the admission of that evidence might have been justified. The Court seems to have thought that the cross-examination referred to in the opinion was a device by the prosecutor to get before the same jury evidence which had been excluded when first offered on the Government's case in chief.'

The circumstances in the instant case are entirely different. The Government did not attempt to get the evidence of petitioner's 1950 possession of narcotics before the jury as part of its case. It was petitioner who opened the question as to his possession of narcotics other than those involved at the trial. We submit that by his voluntary testimony in that respect he himself injected into the case the issue on which the suppressed evidence was admitted so as to permit testimony as to what the agents had found at the time of the illegal search in 1950, in order to show the falsity of his voluntary statement.

Moreover, in *Agnello,* and in *Mahoney* v. *United States,* 26 F. 2d 902 (C. A. 4), on which petitioner also relies, the suppressed evidence was so close-

[1] Similarly, in *Mahoney* v. *United States*, 26 F. 2d 902 (C. A. 4), on which petitioner also relies, the defendant on direct examination merely testified that she did not make the particular sale charged. This was not directly contradicted by the suppressed evidence of the seizure of liquor shortly after the sale. It was not until cross-examination that the defendant denied that this other liquor had been found in her home.

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ly related in point of time to the offense charged that there was a real danger that the suppressed evidence would be considered by the jury as proof of guilt, as of affirmative benefit to the Government. No such danger existed here, since the suppressed evidence related to a point in time remote from the offenses charged. In addition, there was here, as there was not in *Agnello,* an instruction specifically limiting the jury's consideration of the suppressed evidence to the issue of credibility.[8] Thus, there was in this case no danger that the suppressed evidence would be used as affirmative evidence in behalf of the Government beyond the limited scope for which we contend it was admissible, i. e., merely to neutralize the effect of petitioner's perjury.

Petitioner argues (Br. 12) that the changes in phraseology which occurred in the evolution of Rule 41 (e) of the Federal Rules of Criminal Procedure reflect an intention to preclude the admissibility of suppressed evidence under the circumstances here involved. He points to the fact that the preliminary drafts provided that suppressed property "shall not be admissible in evidence at any hearing or trial of the proceeding in connection with which the seizure occurred,"

[8] In the *Agnello* case, both the Government and the defendants agreed that the can of cocaine there involved "was admitted in evidence, not to establish the fact that a crime had been committed, but to attack the credibility of the witness Frank Agnello" (No. 6, O. T. 1925, Gov. Br., p. 4; Pet. Br., p. 4), but no limiting instructions were sought or given.

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whereas the final draft provides that suppressed evidence "shall not be admissible in evidence at any hearing or trial." It is probable that the intent of the Advisory Committee in making this change was to prevent the Rule from limiting the *Weeks* doctrine to exclude such situations as were involved in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. In fact, the notes of the Advisory Committee indicate an intention merely to restate the existing law. On the other hand, the limitation which is here urged is not in conflict with the *Silverthorne* case and is not dependent upon the admission of the evidence being sought in a trial other than one in connection with which the seizure occurred. Therefore the change in the language relied on by petitioner has no relevance whatever to the present case. Obviously, the very special circumstances presented by the instant case were not within the contemplation of the Rule.

The fear that to interpret the exclusionary rule to permit the use of suppressed evidence in rebuttal would be so derogatory of the policy of the rule as to reduce the Fourth Amendment to a form of words, is unfounded. The use of the evidence in question in the particular circumstances of this case does not offend the policy of the exclusionary rule. There is no danger that such use, for the limited purpose of impeachment, would tend to destroy the rule in all instances where the defendant testifies in his own

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behalf, for the only situations in which such evidence could be used would be where, as here, a defendant tries to take advantage of the rule deliberately to testify falsely. Such evidence never could be used, either directly or indirectly, by the Government in support of its case in chief. It would be inadmissible for that purpose to show a pattern of offenses, as tending to prove intent or the like, for such proof would go to the Government's case in chief. Its use in any case where the defendant affirmatively protests his innocence of the charge for which he is on trial can be precluded merely by a recognition that a general denial of this character is not sufficient to open the door. It would not even be admissible as extrinsic evidence to refute any collateral testimony initially elicited on cross-examination, as in the *Agnello* and *Mahoney* cases, *supra,* since such testimony is ordinarily irrebuttable. All we contend is that, where a defendant seeks to take advantage of the rule affirmatively to lie to the court and the jury, the rule of exclusion should not be invoked to preclude the prosecution from nullifying the effect of such a lie.

This Court has recognized that the right of privacy guaranteed by the Fourth Amendment is not wholly protected in all instances by the rule of the *Weeks* case. There are two recognized limitations upon the *Weeks* rule: The limitation that only the victim of an unlawful search and seizure has standing to object to the use of the

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seized evidence (*Connolly* v. *Medalie,* 58 F. 2d 629, 630 (C. A. 2); cf. *Goldstein* v. *United States,* 316 U. S. 114, 121); and the limitation of the operation of the rule to acts of federal officers. *Lustig* v. *United States,* 338 U. S. 74, 78–79; *Byars* v. *United States,* 273 U. S. 28, 33. These two limitations upon the rule tend to detract from its intended deterrent effect more than the limitation imposed by the decision below could possibly do. As is pointed out above, permitting the use of the evidence in rebuttal will not encourage violations of the Fourth Amendment since in usual course evidence is sought out to be used as proof of crime, not for impeachment purposes. "General propositions do not decide concrete cases." Holmes, J., dissenting in *Lochner* v. *New York,* 198 U. S. 45, 76. And as stated in *Monagas* v. *Vidal,* 170 F. 2d 99, 106 (C. A. 1), certiorari denied, 335 U. S. 911, in connection with the doctrine of *res judicata* but very pertinent here, "like all rules of judicial administration, although certain basic principles have in the course of time become crystallized, it is to be applied in particular situations as justice and sound application of the policy behind the doctrine require, within, of course, the Constitutional limitations". By limiting the application of the rule of exclusion, petitioner will lose nothing to which he was lawfully entitled. He enjoys immunity from prosecution for the 1950 offense. All that is denied him now is a license to perjure himself in the instant case. Justice cannot suffer by a limitation of the rule under the particular circum-

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stances of this case; rather it will be defeated by a too rigid application.

II

THE EVIDENCE, IF ADMISSIBLE UNDER THE *WEEKS* RULE, WAS OTHERWISE COMPETENT FOR THE PURPOSE FOR WHICH IT WAS OFFERED

Petitioner's argument that, even if the evidence was not inadmissible under the *Weeks* rule, it was not competent and relevant for the purpose for which it was offered, is untenable.

The evidence in question was not offered as proof of the crimes charged against petitioner; it was not offered to show purpose, intent, or a similar previous course of conduct; it was not even offered to contradict petitioner as to a collateral matter raised for the first time in cross-examination. It was offered and admitted in rebuttal for the limited purpose, made clear by the trial judge, of impeaching the credibility of petitioner as to a matter which he had himself first introduced in evidence on his direct examination and thereby made material. As such it was clearly competent evidence for the limited purpose for which the jury was allowed to consider it—the issue of credibility. *Scott* v. *United States,* 172 U. S. 343, 347–348; *United States* v. *Bowcott,* 170 F. 2d 173 (C. A. 7), certiorari denied, 335 U. S. 911; *Nye & Nissen* v. *United States,* 168 F. 2d 846, 856 (C. A. 9), affirmed, 336 U. S. 613; *United States* v. *Bradley,* 152 F. 2d 425 (C. A. 3); *Vamvas* v. *United States,* 13 F. 2d 347 (C. A. 5);

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Strom v. *United States*, 12 F. 2d 233, 234 (C. A. 6), certiorari denied, 271 U. S. 683; *Black* v. *United States*, 294 Fed. 828, 831 (C. A. 5), certiorari denied, 264 U. S. 580; *Tam Shi Yan* v. *United States*, 224 Fed. 422 (C. A. 2).[9]

The Government did not initiate the inquiry into petitioner's past experience with narcotics. Had it done so it might have been bound by his answers and precluded from refuting them by other evidence under the rule against impeachment by extrinsic evidence relied upon by petitioner.[10] Petitioner himself opened up the subject by testifying on direct examination that he never possessed or dealt in narcotics. He made his past conduct, evidencing abiding respect at least for the narcotic laws, a material matter in support of his denial of guilt of the offenses charged. *Scott* v. *United States, supra; Claunch* v. *United States*, 155 F. 2d 261 (C. A. 5); *Strom* v. *United States*, 12 F. 2d 233, 234 (C. A. 6), certiorari denied, 271 U. S. 683. When he thus testified falsely on direct examination as to a

[9] Petitioner's invocation of the Sixth Amendment as a basis for barring the evidence (Br. 15) is completely baseless. It would apply with equal force to the admission of evidence of prior illegal activity in order to show a course of conduct, intent, or any of the other bases on which such evidence has always been found admissible.

[10] *United States* v. *Klass*, 166 F. 2d 373, 376 (C. A. 3), upon which petitioner relies (Pet. Br., p. 14), is clearly distinguishable from the instant case; the testimony rebutted was not adduced on direct testimony, but merely elicited on cross-examination.

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matter bearing on his credibility, impeachment thereof was no longer limited to his answers on cross-examination, and countervailing evidence was relevant and competent under the cases cited above.

A very similar situation was involved in *Brady* v. *United States,* 148 F. 2d 394 (C. A. 9), in which a defendant, accused of violations of the narcotics laws, testified on direct examination that he was not a narcotic addict, and that he had never seen, purchased or used narcotics. In rebuttal the Government introduced evidence, oral and documentary, to the effect that, while awaiting trial, the defendant and his wife, under assumed names, had undergone treatment as narcotic addicts. In holding the evidence admissible, the court said at p. 395:

> Had this showing been offered merely to degrade the accused it would no doubt have been improper to admit it, but appellant himself opened the matter up. Thus evidence of addiction became relevant and proper as rebuttal.

See also *Dowling Brothers Distilling Co.* v. *United States,* 153 F. 2d 353 (C. A. 6), certiorari denied *sub nom. Gould* v. *United States,* 328 U. S. 848, where a defendant, charged with selling at overceiling prices, had testified that he never made any sales over the ceiling, and in rebuttal witnesses were allowed to testify as to overpayments to defendant in connection with sales not charged

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in the indictment. In upholding the admissibility of such testimony the court said, at p. 361:

> It was proper rebuttal going to the credibility of Gould, whatever infirmity, if any, might have attached to it in other circumstances.

The relevance of such evidence for impeachment purposes is not dependent, as petitioner seems to think, upon its "probative value to prove the charge on trial." On the contrary, although some evidence admissible for a relevant limited purpose may have a tendency to establish a fact for which it is inadmissible, the incidental effect is undesired. Cf. 3 Wigmore, *Evidence,* § 889. But, under the well established multiple admissibility rule, "when", as Professor Wigmore states it, "an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity and because the jury might improperly consider it in the latter capacity." 1 Wigmore, *supra,* § 13. The control of any possible abuse must depend upon the instructions the trial court gives the jury. 1 Wigmore, *supra.* In the instant case, the trial court, as the court below found, "was meticulous in protecting his [petitioner's] rights by instructions limiting the consideration of the evidence to the one point for which it was admitted" (R. 188).

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III

IF THE REBUTTAL TESTIMONY WAS INADMISSIBLE, THE ERROR IN ADMITTING IT WAS, IN THE CIRCUMSTANCES OF THIS CASE, HARMLESS

There is no question that the Government's evidence in the case in chief, independently of the rebuttal testimony, overwhelmingly established the sales of the narcotics. The testimony of the purchasers concerning their transactions with petitioner was closely corroborated by the narcotics agents, who on each occasion carefully supervised and observed the actions of the purchaser immediately prior to and following the transaction.

Thus, the mass of evidence pointing to petitioner's guilt makes the challenged rebuttal testimony of little significance against the background of the record as a whole. This is particularly true, since such testimony related to an entirely separate transaction which had occurred more than a year before the acts for which petitioner was being tried, and since the limited purpose of the testimony was specifically explained to the jury. Moreover, the questioned rebuttal testimony concerning the 1.1 grains of heroin was reduced in importance by the other rebuttal testimony, to which petitioner made no objection at the trial and the competency of which he does not now deny, concerning his admissions, on February 24, 1950, of his wholesale purchases of one and two-ounce quantities of narcotics from

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Chicago dealers. Such admissions were voluntarily made and were therefore competent evidence for the purpose used. Since this other rebuttal testimony impeached petitioner's credibility, the error, if any, in the admission of the questioned testimony, specifically for the purpose of attempting to accomplish the same result, was harmless.

In view of the cumulative nature of the questioned testimony, its strict limitation by the trial judge, and the overwhelming evidence of guilt, summarized in the Statement, *supra*, we submit that the admission of such testimony would not warrant a reversal of the conviction. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 235.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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